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# Montana Cannabis Industry Association v. State of Montana and the Constitutionality of Medical Marijuana

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***MONTANA CANNABIS INDUSTRY ASSOCIATION V. STATE  
OF MONTANA AND THE CONSTITUTIONALITY OF  
MEDICAL MARIJUANA***

**Thomas J. Bourguignon\***

“But the wise know that foolish legislation is a rope of sand, which perishes in the twisting; that the State must follow, and not lead the character and progress of the citizen; . . . and that the form of government which prevails, is the expression of what cultivation exists in the population which permits it. The law is only a memorandum.”

—Ralph Waldo Emerson<sup>1</sup>

I. INTRODUCTION

This note tells the story of two laws, both of them bad. In 2011, the Montana legislature attempted to fix an overly-permissive 2004 law allowing for the use of medical marijuana. Unfortunately, the new law, like its predecessor, was a “rope of sand.” In *Montana Cannabis Industry Association v. State of Montana (MCIA)*,<sup>2</sup> the Supreme Court of Montana upheld the constitutionality of the 2011 statute that restricted the activities of medical marijuana providers and registered cardholders.<sup>3</sup> The Court reversed the district court and held that the State’s exercise of police power to regulate for the public health and safety did not implicate the plaintiffs’ rights under the Montana Constitution.<sup>4</sup> The Court also chose not to dismiss the case for lack of justiciability despite the appearance of a direct conflict with the federal Controlled Substances Act.<sup>5</sup>

This note argues that the Court failed to analyze the legal issues in sufficient detail and that, if it had done so, it would likely have enjoined crucial portions of the 2011 statute. Section II provides background on federal and state laws regarding the use of marijuana. Section III offers a summary of the trial court’s decision to enjoin specific provisions in the statute and the Court’s decision in *MCIA* to reverse the trial court. Section IV of-

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1. Ralph Waldo Emerson, *Politics*, in *The Annotated Emerson* 248, 250 (David Mikics ed., The Belknap Press of Harvard University Press 2012).

2. *Mont. Cannabis Indus. Assn. v. State*, 286 P.3d 1161 (Mont. 2012).

3. *Id.* at 1163.

4. *Id.* at 1165–1168.

5. *Id.* at 1169–1170 (Nelson, J., dissenting).

fers a critical analysis of the majority opinion and the dissent in *MCIA* and argues that the Court was incorrect in its analysis of the state constitutional issues although it was correct not to dismiss the matter because of federal preemption of the state law.

## II. BACKGROUND ON LAWS REGULATING MARIJUANA

The history of marijuana use in America tends to coincide with societal concerns about the culture, or counterculture, surrounding marijuana.<sup>6</sup> Scientific studies regarding the effects of marijuana tend to support the polemical positions of special interests, either marijuana advocates or opponents.<sup>7</sup> This section will summarize three historical stages in the relationship between marijuana and American law and culture.

### A. Early Regulation of Marijuana

According to one historian of drugs and alcohol, “the practice of smoking cannabis leaves arrived in the United States with Mexican immigrants, who had come north during the 1920s to work in agriculture, and extended to white and black jazz musicians.”<sup>8</sup> With the onset of Prohibition in 1920, increasing numbers of Americans began to consume marijuana instead of alcohol.<sup>9</sup> During the Great Depression, immigrants “became an unwelcome minority linked with violence and with growing and smoking marijuana.”<sup>10</sup>

Marijuana was regulated as early as the 1906 Pure Food and Drug Act, which required products containing marijuana to include a label showing the quantity of the drug.<sup>11</sup> In the 1920s and 1930s, some western states, wary of immigrants, urged the federal government to regulate marijuana.<sup>12</sup> The states then promulgated laws restricting marijuana use; by 1937, every

6. See Gerald F. Uelman, Victor G. Haddox, & Alex Kreit, *Drug Abuse and the Law Sourcebook: 2012–2013 Edition, Vol. 1*, 307–309 (West 2012) (observing the “clear-cut separation” in American thought, both public and professional, between “alcohol and tobacco on the one hand, and ‘narcotics’ on the other. Use of alcohol and tobacco were indigenous American practices. The intoxicant use of narcotics was not native, however, and the users of these drugs were either alien . . . or perceived to be marginal members of society.”).

7. Richard E. Isralowitz & Peter L. Meyers, *Illicit Drugs*, 17 (Greenwood 2011).

8. David F. Musto, M.D., *Drugs in America: A Documentary History*, 189 (New York University Press 2002). Before the 1920s, cannabis existed in America in the form of hashish. *Id.* at 405–406.

9. Edward M. Brecher, *Licit and Illicit Drugs*, 410 (Little, Brown & Company 1972).

10. Musto, *supra* n. 8, at 189.

11. Michael Berkey, Student Author, *Mary Jane’s New Dance: The Medical Marijuana Legal Tango*, 9 *Cardozo Publ. L. Policy & Ethics J.* 417, 423 (2011).

12. Musto, *supra* n. 8, at 189–190.

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state had restricted marijuana use.<sup>13</sup> A federal statutory scheme designed to deter marijuana use, the Marihuana Tax Act, was passed in 1937.<sup>14</sup> In 1941, cannabis was removed from the U.S. Pharmacopeia.<sup>15</sup> In 1951 Congress created mandatory minimum penalties for violations of the Marihuana Tax Act, and in 1956 the Narcotic Control Act increased the penalties.<sup>16</sup>

### B. Systematic Federal Action

In 1969 the United States Supreme Court held the Marihuana Tax Act unconstitutional.<sup>17</sup> As recreational marijuana use increased substantially during the 1960s, particularly among young people, President Nixon came to view marijuana use as part of the “moral decay in American society.”<sup>18</sup> In an effort to reduce this sense of moral decay, the president declared a “war on drugs.”<sup>19</sup> Congress passed the Comprehensive Drug Abuse and Prevention and Control Act of 1970 (CSA), replacing previous drug laws with a comprehensive regulatory scheme.<sup>20</sup> President Nixon created a National Commission on Marijuana and Drug Abuse in 1971 to undertake an extensive study of the use of marijuana and make recommendations for federal policy.<sup>21</sup> The committee’s report, *Marijuana: A Signal of Misunderstanding*, concluded that marijuana use was not dangerous and should be decriminalized.<sup>22</sup>

The CSA divides drugs into five schedules.<sup>23</sup> Schedule I drugs are the most restricted.<sup>24</sup> A Schedule I drug is considered to have a “high potential for abuse,” has “no currently accepted medical use,” and is not safe to use under medical supervision.<sup>25</sup> Marijuana is a Schedule I drug.<sup>26</sup> The federal

13. Uelmen et al., *supra* n. 6, at 309. The states did not all act on their own initiative. In 1932 the National Conference of Commissioners on Uniform State Laws drafted “an optional marihuana provision” in its Uniform National Drug Act, and many states adopted that provision. R

14. Musto, *supra* n. 8, at 190. Employing Congress’ tax power as a means of prohibition, the Marihuana Tax Act allowed transfers of marihuana by paying a \$1 per ounce tax for anyone registered under the Act; however, those unregistered under the Act were required to pay a \$100 per ounce tax. *Id.* at 430–432. R

15. Berkey, *supra* n. 11, at 425. R

16. *Id.* at 425–426.

17. *Leary v. U.S.*, 395 U.S. 6 (1969).

18. Berkey, *supra* n. 11, at 426. R

19. *Gonzales v. Raich*, 545 U.S. 1, 10 (2005).

20. Uelmen et al., *supra* n. 6, at 3. R

21. *Id.* at 307.

22. Musto, *supra* n. 8, at 460. R

23. 21 U.S.C. § 812(a) (2013).

24. 21 U.S.C. § 812(b)(1); Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States’ Overlooked Power to Legalize Federal Crime*, 62 Vand. L. Rev. 1421, 1433 (2009).

25. 21 U.S.C. § 812(b)(1).

26. Mikos, *supra* n. 24, at 1433. Mikos compares the “seriousness of this classification” to cocaine and methamphetamine, both of which are on Schedule II. *Id.* at 1433 n. 49. R

ban on marijuana has survived attempts at moving the drug to a less-restricted schedule as well as attempts at challenging the constitutionality of the determination to place marijuana on Schedule I.<sup>27</sup>

The war on drugs caused a “decline in favorable attitudes toward marijuana that began in the late 1970s” and continued into the twenty-first century.<sup>28</sup> One scholarly study summarized America’s attitude toward the war on drugs:

An analysis of 47 national surveys conducted from 1978 to 1997 on what Americans think about the war on drugs was published in the *Journal of the American Medical Association*. The conclusion over that time period was that Americans do not think the war has succeeded but they don’t want to give up on the efforts. Furthermore, they believe illicit drug use is a moral rather than public health issue, and there is weak support for increasing funding for drug treatment.<sup>29</sup>

### C. Medical Marijuana and State Laws

In 1996 California voters approved Proposition 215, the Compassionate Use Act (CUA), making California the first state since the passage of the CSA to permit the use of marijuana for medical purposes.<sup>30</sup> The CUA ensures “patients and their primary caregivers who obtain and use marijuana for medical purposes upon the recommendation of a physician are not subject to criminal prosecution or sanction.”<sup>31</sup>

Since the passage of the CUA, a number of other states have legalized medical marijuana. At the time of this writing, twenty states and the District of Columbia have legalized medical marijuana.<sup>32</sup> Most of these states require the medical marijuana user be diagnosed with a debilitating medical condition and a physician recommend marijuana for the patient.<sup>33</sup> Some

27. *Id.* at 1436–1437. Mikos cites *Gonzales v. Raich* as a leading case in which plaintiffs unsuccessfully challenged Congressional authority under the Commerce Clause to regulate marijuana produced and consumed for medical purposes within a single state.

28. Musto, *supra* n. 8, at 190–191.

29. Isralowitz & Meyers, *supra* n. 7, at 43–44.

30. Uelman et al., *supra* n. 6, at 377; Mikos, *supra* n. 24, at 1427–1428.

31. Cal. Health & Safety Code § 11362.5(b)(1)(B) (2013).

32. Procon.org, *20 Legal Medical Marijuana States and D.C.: Laws, Fees, and Possession Limits*, <http://medicalmarijuana.procon.org/view.resource.php?resourceID=000881> (last updated Sept. 16, 2013). The relevant statutes for these twenty states and the District of Columbia are as follows: Alaska Stat. § 17.37.010 (Lexis 2011); Ariz. Rev. Stat. Ann. § 36–2801 (West 2011); Cal. Health & Safety Code § 11362.5 (2011); Colo. Const. art. XVIII, § 14; Conn. Gen. Stat. § 21a–253 (2011); D.C. Code § 7–1671.01 (West 2011); Del. Code Ann. tit. 16, § 4901A (Lexis 2011); Haw. Rev. Stat. § 329–121 (2012); 40 Ill. Comp. Stat. 130/1 (2013); 22 Me. Rev. Stat. Ann. § 2421 (2012); Mass. Gen. Laws ch. 94C App. § 1–1 (2011); Mich. Comp. Laws § 333.26421 (2012); Mont. Code Ann. § 50–46–301 (2011); Nev. Rev. Stat. § 453A.010 (2011); N.H. Rev. Stat. Ann. § 126–X:1 (West 2013); N.J. Stat. Ann. § 24:6I–1 (West 2011); N.M. Stat. § 26–2B–1 (2012); Or. Rev. Stat. § 475.300 (2011); R.I. Gen. Laws § 21–28.6–1 (2012); Vt. Stat. Ann. tit. 18, § 4472 (2012); Wash. Rev. Code § 69.51A.005 (2012).

33. Mikos, *supra* n. 24, at 1428.

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states require medical marijuana users to provide the state a signed form from their physician to become a registered marijuana user.<sup>34</sup> In many states, a permit to possess and use medical marijuana functions as an affirmative defense for state criminal charges relating to use or possession of the drug.<sup>35</sup>

State laws regarding medical marijuana continue to evolve rapidly. At the time of this writing, four states have pending legislation to legalize medical marijuana.<sup>36</sup> Two states with medical marijuana programs already in place, Colorado and Washington, passed voter initiatives in 2012 to legalize marijuana for recreational use.<sup>37</sup> It remains to be seen what legal challenges or changes in social views of marijuana will emerge from those states' full legalization of marijuana.<sup>38</sup>

### III. *MONTANA CANNABIS INDUSTRY ASSOCIATION v. STATE OF MONTANA*

#### A. *Factual and Procedural History*

When the State of Montana passed a comprehensive drug law in 1969, it included marijuana as a “dangerous drug,” thus prohibiting the use or possession of marijuana.<sup>39</sup> Marijuana remained illegal for all uses until 2004, when almost 62% of Montana voters supported I–148, a statewide ballot initiative approving the legalization of medical marijuana.<sup>40</sup> The resulting law, the 2004 Medical Marijuana Act (the 2004 MMA), allowed “qualifying patients” with certain health conditions to obtain a permit to grow, possess, and use marijuana for medical purposes, provided that they

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34. *Id.* at 1428–1429.

35. *Id.* at 1430.

36. Procon.org, *Four States with Pending Legislation to Legalize Medical Marijuana*, <http://medicalmarijuana.procon.org/view.resource.php?resourceID=002481> (last updated Aug. 1, 2013). The website also lists three states with laws “favorable towards medical marijuana” but do not actually legalize its use; and thirteen states where proposed medical marijuana legislation failed.

37. Colo. Const. art. XVIII, § 16; Wash. Rev. Code § 69.51A.005; Niraj Chokshi, GovBeat, *After legalizing marijuana, Washington and Colorado are starting to regulate it*, <http://www.washingtonpost.com/blogs/govbeat/wp/2013/10/09/after-legalizing-marijuana-washington-and-colorado-are-starting-to-regulate-it/> (Oct. 9, 2013, 10:48 a.m.).

38. On August 29, 2013, Deputy Attorney General James M. Cole released a memorandum that in effect announces a policy of deprioritization of enforcement of the CSA in Colorado and Washington. Memo. From James M. Cole, Dep. Atty. Gen. for U.S. Dept of Just., to all U.S. Attys., *Memo. for All U.S. Attys., Guidance Regarding Marijuana Enforcement* (Aug. 29, 2013) (available at <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>).

39. 1969 Mont. Laws 765–766.

40. Amend. Compl. for Decl. and Inj. Relief at 2, *Mont. Cannabis Indus. Assn v. State of Montana*, <http://legaldocs.mtca.org/Complaint%20for%20Declartry%20&%20Injctv%20Relief.pdf> (Mont. Dist. June 15, 2011).

could obtain written notice from a physician.<sup>41</sup> The 2004 MMA allowed medical marijuana “caregivers” to assist qualifying patients<sup>42</sup> and prohibited any prosecution or penalization of physicians for providing certification for qualifying patients.<sup>43</sup> The 2004 MMA placed no restriction on the number of qualifying patients a single caregiver could assist.<sup>44</sup> The 2004 MMA was short and strikingly general.<sup>45</sup>

For the next several years, enrollment in the medical marijuana permitting program was relatively low.<sup>46</sup> Then in 2009, the U.S. Department of Justice released a policy statement (the “Ogden Memorandum”) that implied the federal government would deprioritize the enforcement of its drug laws with respect to marijuana in those states in which medical marijuana laws had been passed.<sup>47</sup> Perhaps as a result of the Ogden Memorandum, medical marijuana caregivers ramped up their operations, and the number of qualifying patients in Montana’s medical marijuana program expanded at an alarming rate.<sup>48</sup> By the middle of 2010, Montana had almost 20,000 qualifying patients and almost 4,000 registered caregivers.<sup>49</sup>

The legislature’s first attempt in 2011 at amending the 2004 MMA was House Bill 161, which simply repealed I–148 and the 2004 MMA.<sup>50</sup> House Bill 161 passed and was vetoed by Governor Brian Schweitzer.<sup>51</sup> Senate Bill 423, which repealed the 2004 MMA and replaced it with a new statu-

41. Mont. Code Ann. §§ 50–46–102 to 103 (2005); Br. of Appellant, *Mont. Cannabis Indus. Assn. v. State of Montana*, 2011 WL 5893859 at 3–4 (Mont. Nov. 16, 2011) (DA 11–0460).

42. Mont. Code Ann. §§ 50–46–102(1)(a), 103(4) (2005).

43. *Id.* at § 50–46–201(4).

44. *Id.* at §§ 50–46–102 to 210.

45. *Id.*

46. State’s Memo. Opposing Pl.’s Mot. for Prelim. Inj., *Mont. Cannabis Indus. Assn. v. State of Montana*, 2011 WL 3626008 at 3 (Mont. Dist. June 3, 2011) (DDV–2011–518). It was only in 2008 that the program reached 1,000 registered cardholders.

47. Memo. from David W. Ogden, Dep. Atty. Gen. for the U.S. Dept. of Just., to Selected U.S. Attys., *Memo. for Selected U.S. Attys., Investigations and Prosecutions in States Authorizing the Med. Use of Marijuana* (Oct 19, 2009) (available at <http://www.justice.gov/opa/documents/medical-marijuana.pdf>). This memorandum was clarified in 2011 by another memorandum due to the “increase in the scope of commercial cultivation” of medical marijuana. Memo. from James M. Cole, Dep. Atty. Gen. for U.S. Dept. of Just., to U.S. Attys., *Memo. for U.S. Attys., Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Med. Use* at 1–2 (June 29, 2011) (available at <http://www.justice.gov/oip/docs/dag-guidance-2011-for-medical-marijuana-use.pdf>).

48. Br. of Appellant, *supra* n. 41, at 4–5.

49. State’s Memo. Opposing Pl.’s Mot. for Prelim. Inj., *supra* n. 46, at 4.

50. *Mont. Cannabis*, 286 P.3d at 1163. Interestingly, on March 14, 2011, the same day that Montana’s House Judiciary Committee considered HB–161, federal law enforcement raided a number of medical marijuana facilities that were operating legally under the 2004 MMA. Emilie Ritter, *Federal Agents Raid Montana Medical Marijuana Facilities*, Reuters (March 14, 2011) (available at <http://www.reuters.com/article/2011/03/15/us-montana-marijuana-idUSTRE72E00520110315>).

51. *Mont. Cannabis*, 286 P.3d at 1163.

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tory framework, passed and became law (the 2011 MMA) on May 14, 2011 without the Governor's signature.<sup>52</sup>

The 2011 MMA—significantly longer and more specific than the 2004 MMA—allows “registered cardholders” to use marijuana for medical purposes, but it sharply limits the eligibility of many individuals who would have been registered as qualifying patients under the 2004 MMA, as well as limiting the activities of medical marijuana “Providers.”<sup>53</sup> Some of the most significant provisions of the 2011 MMA include the following limitations: (1) “severe chronic pain” was defined more specifically and requires “objective proof” such as x-rays or MRI images;<sup>54</sup> (2) physicians who certify 25 or more patients in a 12-month period are subject to review by the Montana Board of Medical Examiners;<sup>55</sup> (3) Providers may only assist up to three registered cardholders;<sup>56</sup> (4) Providers may not charge any fee beyond the fees required for registered cardholders to apply for or renew their registration cards;<sup>57</sup> (5) state law enforcement is permitted to conduct “unannounced inspections” of the premises where Providers grow marijuana for registered cardholders;<sup>58</sup> and (6) advertising of marijuana-related products are prohibited in any medium.<sup>59</sup>

Shortly before the 2011 MMA became law, the Montana Cannabis Industry Association and other caregivers and qualifying patients initiated the present lawsuit against the State, alleging the 2011 MMA was unconstitutional under the Montana Constitution.<sup>60</sup> The plaintiffs moved the district court to both temporarily and permanently enjoin the entire 2011 MMA, arguing the 2011 MMA would have the effect of denying registered cardholders access to medical marijuana.<sup>61</sup> The State argued individuals do not have a fundamental right to possess or use marijuana free from state regulation.<sup>62</sup> Shortly after the 2011 MMA passed into law, the Montana Cannabis Industry Association began the second prong of its attack against the law: it prepared a statewide veto referendum, IR-124 to appear upon the Novem-

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52. State's Memo. Opposing Pl.'s Mot. for Prelim. Inj., *supra* n. 46, at 5.

53. *Mont. Cannabis*, 286 P.3d at 1163–1164; Mont. Code Ann. §§ 50–46–301 to 303 (2011). The 2011 MMA replaces the term “caregivers” with “providers” and replaces “qualifying patient” with “registered cardholder.” Mont. Code Ann. § 50–46–302 (2011).

54. Mont. Code Ann. § 50–46–302(2)(c) (2011).

55. *Id.* at § 50–46–303(10).

56. *Id.* at § 50–46–308(3)(a)(i).

57. *Id.* at § 50–46–308(4), (6).

58. *Id.* at § 50–46–329(1).

59. *Id.* at § 50–46–341.

60. Amend. Compl. for Decl. and Inj. Relief, *supra* n. 40, at 20–21.

61. *Mont. Cannabis*, 286 P.3d at 1163; Amend. Compl. for Decl. and Inj. Relief, *supra* n. 40, at 18–19.

62. State's Memo. Opposing Pl.'s Mot. for Prelim. Inj., *supra* n. 46, at 7.

ber 2012 ballot asking voters whether the 2004 MMA should be replaced by the 2011 MMA.<sup>63</sup>

On June 30, 2011, the district court issued an order for preliminary injunction that largely followed the plaintiffs' manner of framing the case and enjoined the following: the ban on advertising, the provisions on inspection, the provision requiring review of physicians who recommend marijuana to 25 or more patients, the provision prohibiting Providers from assisting more than three registered cardholders, and the provision prohibiting Providers from charging fees for their services.<sup>64</sup> The plaintiffs appealed, arguing that the district court erred in not enjoining the 2011 MMA in its entirety.<sup>65</sup> The State of Montana also appealed, arguing the district court erred in applying strict scrutiny analysis because the plaintiffs' fundamental rights were not implicated by the 2011 MMA.<sup>66</sup>

In their appellate briefs, the plaintiffs continued their approach of asserting that the 2011 MMA infringed a number of rights protected in the Montana Constitution and that the State was wrong to frame the case as a question of whether a fundamental right to medical marijuana exists.<sup>67</sup> The State reiterated the need for a tougher law due to a number of problems (the "Widespread Abuses") that had arisen under the more-relaxed 2004 MMA.<sup>68</sup> The State focused its argument narrowly around three rights: the right to pursue employment, the right to seek health, and the right to privacy.<sup>69</sup> It argued that because these rights were not infringed, the lower

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63. Montana Secretary of State, Initiative Referendum No. IR-124, <http://sos.mt.gov/Elections/Archives/2010s/2012/Initiatives/IR-124.asp> (accessed Oct. 17, 2013). On November 6, 2012, IR-124 passed by a margin of 68,000 votes, or about 57% in favor, meaning that voters approved the repeal of the 2004 MMA and its replacement by the 2011 MMA. Montana Secretary of State, 2012 Statewide General Election Canvass, [http://sos.mt.gov/Elections/2012/2012\\_General\\_Canvass.pdf](http://sos.mt.gov/Elections/2012/2012_General_Canvass.pdf), 27 (accessed Oct. 17, 2013).

64. Or. on Mot. for Prelim. Inj., *Mont. Cannabis Indus. Assn. v. State of Montana*, <http://legaldocs.mt.cia.org/judge-decision-2011-06-30.pdf> at 15 (Mont. Dist. June 30, 2011).

65. *Mont. Cannabis*, 286 P.3d at 1164.

66. *Id.*

67. Appellee's Response and Cross-App. Br., *Mont. Cannabis Indus. Assn. v. State of Montana*, 2012 WL 28772 at 28-32 (Mont. Jan. 17, 2012) (DA 11-0460).

68. Br. of Appellant, *supra* n. 41, at 4-5. The Widespread Abuses are as follows: the alarming growth in the number of registered cardholders (there were 30,000 registered cardholders by the time of the 2011 legislature); large-scale commercial grow operations; proliferation of storefront operations selling marijuana; traveling "medical clinics" that would register hundreds of cardholders in a single day; registered cardholders smoking marijuana in public; large numbers of probationers receiving medical marijuana cards; the large numbers (almost 30% of all cardholders) of otherwise-healthy 18 to 30 year-olds becoming registered cardholders due to "chronic pain"; and the Board of Medical Examiners' concern that some physicians had recommended marijuana without "establishing a bona fide doctor-patient relationship, or otherwise conducting appropriate medical examinations."

69. *Id.* at 12-21.

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court erred in applying strict scrutiny review rather than rational basis review.<sup>70</sup>

A brief remark regarding levels of judicial scrutiny is warranted. Under the Montana Constitution, the State has broad police powers to pass laws that are rationally related to the State's goals, as long as no rights are infringed. When a fundamental right included in the Montana Constitution's Declaration of Rights is implicated by a statute, courts will use "strict scrutiny" analysis.<sup>71</sup> Under strict scrutiny analysis, the State "has the burden of showing the law . . . is narrowly tailored to serve a compelling government interest."<sup>72</sup> "Middle-tier scrutiny" involves a balancing test and is applied if an implicated right appears in the Montana Constitution but not within the Declaration of Rights.<sup>73</sup> The "rational basis" test is the least demanding of the three levels of scrutiny. It is applicable when neither strict scrutiny nor middle-tier scrutiny apply.<sup>74</sup> Under this test, a law need only be "rationally related to a legitimate government interest."<sup>75</sup> The rational basis test as applied to the Montana Constitution thus raises a troubling question: if a statute does not infringe the Declaration of Rights in the Montana Constitution, and it does not infringe any other part of the Montana Constitution, then what rights, if any, *have* been infringed; and if no rights have been infringed, why would courts even impose rational basis analysis?<sup>76</sup>

### *B. Majority Holding*

Following the State's manner of framing its argument, the Court considered whether the 2011 MMA implicated the rights to pursue employment, seek health, and privacy.<sup>77</sup> In a six to one decision, the Court held the 2011 MMA did not implicate any of the three rights and remanded the case to the district court with instructions to decide the matter by applying rational basis review.<sup>78</sup> The Court declined to consider the plaintiffs' claim on appeal that the 2011 MMA should be enjoined in its entirety.<sup>79</sup>

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70. *Id.* at 12–21. Interestingly, the State did not attempt to argue that the 2011 MMA could survive strict scrutiny review because it had a compelling interest in curbing the Widespread Abuses.

71. *Snetsinger v. Mont. U. System*, 104 P.3d 445, 449–450 (Mont. 2004).

72. *Id.* at 450 (citation omitted).

73. *Id.*

74. *Id.*

75. *Id.*

76. This question was raised in conversation by Professor Anthony Johnstone. Conversation with Anthony Johnstone, Asst. Prof. of L., Univ. of Mont. Sch. of L. (Oct. 8, 2013).

77. *Mont. Cannabis*, 286 P.3d at 1164.

78. *Id.* at 1163, 1168.

79. *Id.* at 1168.

### 1. Right to Pursue Employment

In a brief analysis, the Court considered the plaintiffs' argument that the 2011 MMA implicated the right of Providers to pursue employment.<sup>80</sup> The Court followed its decision in *Wadsworth v. State*<sup>81</sup> in asserting that, although the "right to the opportunity to pursue employment" is not expressly included in Article II, Section 3 of the Montana Constitution, it is a fundamental right because it is "a right without which other constitutionally guaranteed rights would have little meaning."<sup>82</sup>

At the urging of the State, the Court chose to follow its decision in *Wiser v. State*,<sup>83</sup> in which the plaintiff denturists challenged a regulation that required denturists to refer partial-denture patients to a dentist before performing the partial denture procedure.<sup>84</sup> The *Wiser* court distinguished *Wadsworth v. State*—in which the plaintiff was "completely proscribed" from outside work—from *Wiser*, where denturists "remain free to pursue denture work generally."<sup>85</sup> The *Wiser* Court also held the right to pursue employment does not extend to a right to pursue employment free of the exercise of the State's police power, in particular because Article II, Section 3 of the Montana Constitution expressly includes the limitation "in all lawful ways."<sup>86</sup>

In the present case, the Court followed *Wiser* and held that the phrase "in all lawful ways" used in Article II, Section 3 of the Montana Constitution circumscribed the right to pursue employment "by subjecting it to the State's police power to protect the public health and welfare."<sup>87</sup> The Court held that individuals "do not have a fundamental right to pursue a *particular* employment" and that medical marijuana Providers, "who are ultimately horticulturalists, remain free to pursue horticulture work generally."<sup>88</sup> Because the fundamental right to pursue employment was not implicated, the Court held that the lower court erred when it applied strict scrutiny analysis instead of the rational basis test.<sup>89</sup>

80. *Id.* at 1165–1166.

81. *Wadsworth v. State*, 911 P.2d 1165 (Mont. 1996).

82. *Mont. Cannabis*, 286 P.3d at 1165 (citing *Wadsworth*, 911 P.2d at 1172). In *Wadsworth* the Court held that a regulation prohibiting state real estate appraisers from seeking outside employment infringed the appraisers' right to pursue employment and that the State failed to show a compelling interest for infringing that right. *Wadsworth*, 911 P.2d at 1174.

83. *Wiser v. State*, 129 P.3d 133 (Mont. 2006).

84. *Id.* at 136.

85. *Id.* at 139.

86. *Id.*

87. *Mont. Cannabis*, 286 P.3d at 1166.

88. *Id.* (emphasis added).

89. *Mont. Cannabis*, 286 P.3d at 1166.

## 2. Right to Seek Health

In an even shorter analysis, the Court considered the plaintiffs' argument that the 2011 MMA implicated the right of registered cardholders to seek health.<sup>90</sup> The Court spent little time on this issue and held that, although an individual has a "fundamental right to obtain and reject medical treatment . . . this right does not extend to give a patient a fundamental right to use any drug, regardless of its legality."<sup>91</sup> The Court asserted that no courts in other jurisdictions have "acceded to this type of affirmative access claim."<sup>92</sup> Again, the Court held that the lower court erred when it applied strict scrutiny analysis instead of the rational basis test.<sup>93</sup>

## 3. Right to Privacy

The plaintiffs urged the Court to follow its decision in *Armstrong v. State*,<sup>94</sup> in which health care providers sued to enjoin a law requiring certain abortions to be performed by physicians and not physicians' assistants.<sup>95</sup> In *Armstrong* the Court issued a strong statement upholding an individual's right to privacy to obtain a medical procedure: "The legislature has no interest, much less a compelling one, to justify its interference with an individual's fundamental privacy right to obtain a particular lawful medical procedure from a health care provider that has been determined by the medical community to be competent to provide that service."<sup>96</sup>

In 2006, the plaintiffs in *Wiser* argued unsuccessfully that the Court should follow *Andrews v. Ballard*,<sup>97</sup> in which a Texas court held that the decision to obtain acupuncture treatment is encompassed by the right to privacy and that a state law requiring the licensing of acupuncturists was unconstitutional.<sup>98</sup> The *Wiser* court concluded that following *Andrews*

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90. *Id.* at 1166–1167.

91. *Id.* at 1166 (citation omitted).

92. *Id.* (citing *Abigail Alliance for Better Access to Developmental Drugs v. Von Eschenbach*, 495 F.3d 695, n. 18 (D.C. Cir. 2007)). Footnote 18 to *Abigail Alliance* lists eight additional federal cases in which constitutional claims of affirmative access to a particular treatment or particular medicine were denied. The analysis of the constitutional claim in *Abigail Alliance* is almost as brief as in *MCIA* and concludes that because there is no constitutional right to a particular medical treatment, the government "reasonably prohibited" the medical treatment in question. *Abigail Alliance*, 495 F.3d at 711. The dissent in *Abigail* makes a spirited and forceful argument that the Fifth Amendment to the United States Constitution protects the fundamental "right to save one's life," thus requiring a showing of a compelling state interest for any regulation of medications. *Id.* at 715–728.

93. *Mont. Cannabis*, 286 P.3d at 1166–1167.

94. *Armstrong v. State*, 989 P.2d 364 (Mont. 1999).

95. *Mont. Cannabis*, 286 P.3d at 1167 (citing *Armstrong*, 989 P.2d at 371–372).

96. *Armstrong*, 989 P.2d at 380.

97. *Andrews v. Ballard*, 498 F. Supp. 1038 (S.D. Tex. 1980).

98. *Wiser*, 129 P.3d at 137 (citing *Andrews*, 498 F. Supp. at 1057). According to the *Wiser* Court, *Andrews* was cited in *Armstrong* only for the "general proposition that individuals have the right to

would force the State to “shoulder the burden of demonstrating that no less restrictive set of qualifications for a license could serve the State’s interest in protecting the health of its citizens.”<sup>99</sup>

In *MCIA* the Court indicated that its decision in *Wiser* narrowed its holding in *Armstrong*: “It does not necessarily follow from the existence of the right to privacy that every restriction on medical care impermissibly infringes that right.”<sup>100</sup> The Court held that the right to privacy “does not encompass the affirmative right of access to medical marijuana” and declined to apply strict scrutiny.<sup>101</sup>

### C. Justice Nelson’s Dissent

Justice Nelson divided his dissent into two sections. In the first part, he diverged from the majority opinion because he believed the case did not present a “justiciable controversy.”<sup>102</sup> Under the Montana Constitution, courts are not authorized to issue advisory opinions.<sup>103</sup> Montana courts are to make a threshold determination whether a case is justiciable.<sup>104</sup> A justiciable controversy must involve “legal relations of parties having adverse legal interests,” and it must allow “specific relief . . . as distinguished from an opinion advising what the law would be upon a hypothetical state of facts, or upon an abstract proposition.”<sup>105</sup>

Justice Nelson opined that the controversy was not justiciable because Montana’s law permitting the use of medical marijuana is in violation of the federal Controlled Substances Act.<sup>106</sup> According to Justice Nelson, the plaintiffs claimed “they have a fundamental right under the Montana Constitution to engage in conduct which is criminal under federal law.”<sup>107</sup> The Supremacy Clause of the United States Constitution requires state law to

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obtain and reject medical treatment” and not for *Andrews*’ holding that a fundamental right exists “to obtain medical care from professionals who have not been determined by the regulating authority to be qualified.” *Wiser*, 129 P.3d at 137 (citing *Armstrong*, 989 P.2d at 379 n. 8).

99. *Wiser*, 129 P.3d at 138 (citation omitted).

100. *Mont. Cannabis*, 286 P.3d at 1167 (citing *Wiser*, 129 P.3d at 137).

101. *Id.* at 1168. To support its conclusion that individuals do not have an affirmative right to access specific drugs, the court cited cases from other jurisdictions, including: (1) *Cal. v. Privitera*, 591 P.2d 919 (Cal. 1979) (no right to obtain drugs that have not been approved for sale); (2) *Carnohan v. U.S.*, 616 F.2d 1120, 1122 (9th Cir. 1980) (rational basis review used because no right exists to obtain an experimental drug “free of the lawful exercise of government police power”); and (3) *Co. of Santa Cruz v. Ashcroft*, 279 F. Supp. 2d 1192, 1203 (N.D. Cal. 2003) (enforcement of the CSA against individuals seeking to use medical marijuana denied plaintiffs a “specific type of treatment,” not the “right to treatment generally”).

102. *Mont. Cannabis*, 286 P.3d at 1169 (Nelson, J., dissenting).

103. *Id.* (citing Mont. Const. art VII, § 4(1)).

104. *Id.* at 1169.

105. *Id.* (citations omitted).

106. *Id.* (citing 21 U.S.C. § 801).

107. *Id.* at 1170.

yield to federal law if “compliance with both federal and state regulations is a physical impossibility.”<sup>108</sup> The present case does not present a justiciable controversy because “when Montana’s courts are asked to interpret Montana’s medical marijuana laws, they are asked, in effect, to issue an opinion advising what the law would be upon a hypothetical state of facts, or upon an abstract proposition.”<sup>109</sup> Justice Nelson suggested that the medical marijuana community might consider changing the federal law first so as to avoid any conflicts with state law.<sup>110</sup>

In the second part of his dissent, Justice Nelson critiqued the majority opinion for holding that the rational basis test should be applied to the plaintiffs’ claims that their fundamental rights to employment, health, and privacy were infringed.<sup>111</sup> Justice Nelson asserted that the Court should have applied strict scrutiny, because the plaintiffs’ *claims* arose under those fundamental rights: “Strict scrutiny applies to an *alleged* infringement of a fundamental right . . . . Here, plaintiffs’ *claims* are premised on Article II, Sections 3 and 10 . . . . We do not apply rational-basis review to legislation which regulates the exercise of a fundamental right.”<sup>112</sup> Justice Nelson then critiqued the majority opinion for expanding the Court’s decision in *Wiser* and reading the State’s police power even more forcefully into the Montana Constitution’s Declaration of Rights.<sup>113</sup> He disagreed with the majority opinion’s “proposition that the parameters of the Article II, Section 3 rights are dictated, circumscribed, or trumped by the State’s police power.”<sup>114</sup> Section IV of this note proposes an analytical framework similar to the analysis in Justice Nelson’s dissent.<sup>115</sup>

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108. *Mont. Cannabis*, 286 P.3d at 1170 (Nelson, J., dissenting) (citing *Ariz. v. U.S.*, \_\_\_ U.S. \_\_\_, 132 S. Ct. 2492, 2501 (2012)).

109. *Id.* at 1171 (citation omitted).

110. *Id.* at 1172.

111. *Id.* at 1172–1173.

112. *Id.* at 1172 (emphasis added) (citations omitted). Justice Nelson appears to be saying strict scrutiny analysis should have been applied merely because the plaintiffs *alleged* that their rights were infringed, not because the Court found that the plaintiffs’ rights actually were infringed.

113. *Id.* at 1173.

114. *Mont. Cannabis*, 286 P.3d at 1173 (Nelson, J., dissenting).

115. That analytical framework requires asking, first, “whether the constitutional provisions upon which plaintiffs rely include the rights they claim.” *Id.* at 1172. Second, it asks whether “a statute or administrative regulation implicates a fundamental right.” *Id.* Third, if the first two questions have been answered in the affirmative, the Court applies strict scrutiny. *Id.* The majority opinion in effect asked the first question and concluded that the rights were circumscribed by the state’s police power. The majority then avoided the second question altogether and concluded strict scrutiny was not appropriate. *Id.* at 1166–1168.

#### D. *The Lower Court's Decision After MCIA*

Shortly after the case was remanded, the district court issued a temporary restraining order against enforcement of the provisions of the 2011 MMA that were the subject of the Court's decision.<sup>116</sup> Then, in January 2013, the district court issued its Order on Preliminary Injunction, in which it applied rational basis review and *still* concluded that the relevant provisions of the 2011 MMA infringed on the plaintiffs' rights under the Montana Constitution.<sup>117</sup> The district court again followed the plaintiffs' anecdotal framing of the argument, concluding that of the 8,404 registered cardholders as of November 2012, approximately 4,332 "would have no source of medical marijuana" if the temporary restraining order were lifted.<sup>118</sup> A full trial for a permanent injunction, reaching the merits of the plaintiffs' case, remains pending.

#### IV. ANALYSIS

The Montana Supreme Court's decision in *MCIA* was troublingly brief.<sup>119</sup> The majority opinion's primary reason—in essence its only reason—for concluding that the rights to employment, health, and privacy were not infringed, was that the State has "police power to regulate to protect the public health and welfare."<sup>120</sup> As Justice Nelson indicated in his dissent, the majority opinion did not correctly analyze the question of whether the plaintiffs' fundamental rights had in fact been infringed.<sup>121</sup> By contrast, the majority opinion in *Armstrong* included a thorough analysis of the application of the right to privacy to a statute limiting a woman's choice of provider when obtaining an abortion.<sup>122</sup>

The majority opinion in *MCIA* failed to analyze a number of factors crucial to the determination of the constitutional rights at issue in the case. The Court should have analyzed the following issues: (A) whether the Montana Constitution does in fact confer a substantive right to employment, health, or privacy; (B) whether the 2011 MMA actually infringed the rights to employment and health; (C) whether the State had a compelling interest

116. Or. Granting Temp. Restraining Or., *Mont. Cannabis Indus. Assn. v. State of Montana*, <http://www.mtcia.org/wp-content/uploads/2012/10/Mt-Cannabis-Industry-v-State-DDV-2011-518-10-26-12-Order-Granting-TRO.pdf> at 6 (Mont. Dist. Oct. 26, 2012) (No. DDV-2011-518). The Temporary Restraining Order enjoined the enforcement of the 2011 MMA's limit of three registered cardholders per provider and the 2011 MMA's prohibition on providers charging a fee for their services.

117. Or. on Prelim. Inj., *Mont. Cannabis Indus. Assn. v. State of Montana*, 2013 WL 496762 at 13 (Mont. Dist. Jan. 16, 2013) (No. DDV-2011-518).

118. Or. on Prelim. Inj., *supra* n. 117, at 9.

119. *Mont. Cannabis*, 286 P.3d at 1165-1168 (majority).

120. *Id.* at 1166 (quoting *Wiser*, 129 P.3d at 139) (emphasis removed).

121. *Id.* at 1172 (Nelson, J., dissenting).

122. *Armstrong*, 989 P.2d at 372-383.

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in passing the 2011 MMA, and whether the 2011 MMA was narrowly tailored to achieve that compelling interest; and (D) whether *MCIA* was a justiciable controversy.

A. *The Montana Constitution recognizes substantive rights to pursue employment and to seek health.*

In 1889, Montana was authorized by an act of Congress to call a constitutional convention and submit a ratified constitution to Congress.<sup>123</sup> A constitutional convention was convened in 1889, a constitution was drafted, and on November 8, 1889 the Montana Constitution went into effect.<sup>124</sup> Article III of the 1889 Constitution, subtitled “a declaration of rights of the people of the State of Montana,” included the following provision, which may have been intended more as a statement of political theory than as a set of restrictions on the power of the state:

All persons are born equally free, and have certain natural, essential and inalienable rights, among which may be reckoned the right of enjoying and defending their lives and liberties, of acquiring, possessing and protecting property, and of seeking and obtaining their safety and happiness in all lawful ways.<sup>125</sup>

In 1970 Montana citizens voted in favor of holding a constitutional convention to revisit the text of the 1889 Montana Constitution.<sup>126</sup> In 1972 the Montana Constitution was approved by a narrow majority of voters.<sup>127</sup> Article II, Section 3 of the Montana Constitution is a Declaration of Rights and is similar to Article III, Section 3 of the 1889 Montana Constitution but with a few significant changes, noted in italics:

All persons are born free and have certain inalienable rights. They include *the right to a clean and healthful environment* and the rights of *pursuing life’s basic necessities*, enjoying and defending their lives and liberties, acquiring, possessing and protecting property, and seeking their safety, *health* and hap-

123. Larry M. Elison & Fritz Snyder, *The Montana State Constitution* 6 (Oxford University Press 2011).

124. *Id.* at 6–7.

125. Mont. Const. of 1889, art. III, § 3. It should be noted this section of the 1889 Constitution was not drafted for Montana’s 1889 Constitution. It had been included in almost identical form in Montana’s 1884 constitution, which was not accepted by Congress for partisan political reasons. Elison & Snyder, *supra* n. 123, at 5–6. The text used in 1884 had in turn been borrowed from Colorado’s 1876 Constitution. Col. Const. of 1876, art. II, § 3. A century earlier, the Declaration of Independence included a similar statement: “We hold these truths to be self-evident: that all men are created equal; that they are endowed, by their Creator, with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness.” *Declaration of Independence* ¶ 2 (1776).

126. Elison & Snyder, *supra* n. 123 at 12.

127. *Id.* at 18. The 1972 Montana Constitution will be referred to hereinafter as the Montana Constitution.

piness in all lawful ways. *In enjoying these rights, all persons recognize corresponding responsibilities.*<sup>128</sup>

Article II, Section 10 of the Montana Constitution was an entirely new addition: “The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.”<sup>129</sup>

In his dissent in *MCIA*, Justice Nelson asserted “this Court has held repeatedly that the rights enumerated in Article II of the Montana Constitution . . . are *fundamental* constitutional rights.”<sup>130</sup> Under the Montana Constitution, a right is considered fundamental either: (1) if it is expressly included in the Declaration of Rights, which is the entirety of Article II of the Montana Constitution;<sup>131</sup> or (2) although not expressly included in Article II it is a right “without which other constitutionally guaranteed rights would have little meaning.”<sup>132</sup> The right to seek health is expressly included in the text of the Montana Constitution.<sup>133</sup> The Court has held that Article II, Section 3 provides a fundamental right to pursue employment because employment is a right without which other constitutional rights would have little meaning.<sup>134</sup> The constitutional text includes temporizing terms that appear to limit or qualify the scope of the right: to *pursue* necessities and to *seek* health.<sup>135</sup> Pursuing necessities and seeking health do not imply a right to *receive* necessities or a right to health generally, which might necessitate a substantial welfare state.<sup>136</sup>

The transcript of the 1972 Constitutional Convention provides only hints as to the delegates’ intent. The report generated by the Bill of Rights

128. Mont. Const. art. II, § 3 (emphasis added).

129. Mont. Const. art. II, § 10.

130. *Mont. Cannabis*, 286 P.3d at 1172 (Nelson, J., dissenting) (emphasis in original) (citations omitted). The right to privacy under Article II, Section 10 of the Montana Constitution will not be further analyzed here, because it is well-established that the right to privacy is expressly included in the Montana Constitution and that the text confers a substantive right. *See generally Gryczan v. State*, 942 P.2d 112 (Mont. 1997) and *Armstrong*, 989 P.2d 364.

131. “Because Article II, Sections 3 and 10 are contained in the Declaration of Rights, it necessarily follows that they are fundamental rights to which strict scrutiny applies.” *Mont. Cannabis*, 286 P.3d at 1172 (Nelson, J., dissenting).

132. *Matter of C.H.*, 683 P.2d 931, 940 (Mont. 1984).

133. Mont. Const. art. II, § 3.

134. *Wadsworth*, 911 P.2d at 1172 (citation omitted); *Wiser*, 129 P.3d at 138.

135. *Elison & Snyder*, *supra* n. 123, at 38. As indicated above, the 1889 Montana Constitution also includes temporizing terms in stating that people have the right of “seeking and obtaining their safety and happiness.” Mont. Const. of 1889, art. III, § 3.

136. The Bill of Rights Committee Report from the 1972 Constitutional Convention includes this comment: “The intent of the committee on this point is not to create a substantive right for all for the necessities of life to be provided by the public treasury.” Mont. Const. Conv. Procs. vol. II, 627 (Mont. Legis. & Legis. Council 1972) (available at [http://courts.mt.gov/library/montana\\_laws.mcp.x](http://courts.mt.gov/library/montana_laws.mcp.x)). *See also Butte Comm. Union v. Lewis*, 712 P.2d 1309, 1311–1312 (Mont. 1985) (the Montana Constitution’s Declaration of Rights provides no right to welfare).

Committee includes the following note about the final sentence of Section 3:

Some [committee members] expressed the feeling that many were accepting rights without recognizing that they create obligations. Others were adamant that a declaration of rights should contain just that: *the rights of persons against governmental abuses* and the rights of minorities against the power of unchecked majorities. The committee felt that the inclusion of such a statement *does not infringe or impair the rights granted in the declaration of rights* but only accords a tone of responsibility to their exercise.<sup>137</sup>

This comment appears to imply that the declaration of rights does indeed grant substantive rights intended to protect individuals against governmental abuses. The delegates also explained their understanding of the use of the term *inalienable*: “it seems that, judging by contemporary community standards, we’ve had no trouble in determining what . . . ‘inalienable rights’ mean.”<sup>138</sup> Delegate Davis opined that an attempt to include a provision prohibiting retail stores from being open on Sunday is “probably a violation of Section 3 of the Bill of Rights . . . . It’s an infringement on the rights of any Seventh Day Adventist who take their day off on Saturday.”<sup>139</sup> Thus it appears that several delegates intended Section 3 to protect substantive rights of individuals. The Section 3 rights may be merely aspirational or hortatory,<sup>140</sup> or they may be substantive.<sup>141</sup> The Court, however, has consistently been willing to find in recent years that the rights to employment and health are substantive and fundamental rights.<sup>142</sup>

137. Mont. Const. Conv. Procs., *supra* n. 136, at vol. II, 627 (emphasis added).

138. Mont. Const. Conv. Procs., *supra* n. 136, at vol. V, 1240. Later in the transcript, a delegate indicated that “I didn’t look it up in the dictionary; but an inalienable right is something, in my estimation, that comes to each one of us just because we’re here and we’re human beings. Even if there was no such thing as a government, all of us would have these rights.” Mont. Const. Conv. Procs., *supra* n. 136 at vol. V, 1637.

139. *Id.* at vol. VI, 2370.

140. See Elison & Snyder, *supra* n. 123, at 38. Elison and Snyder note that “the generalized statement of inalienable rights [in Article II, Section 3] has not been an effective protection for individual rights claimed in opposition to the exercise of state police power.” Further, a report prepared by the Montana Constitutional Convention Commission had this to say: “[S]tatements of political theory are hortatory, generally are not the subject of judicial interpretation and therefore are unenforceable.” Rick Applegate, *Bill of Rights: Constitutional Convention Study No. Ten* 69 (Montana Constitutional Convention Commission 1972).

141. See *e.g.* James C. Nelson, *Keeping Faith with the Vision: Interpreting a Constitution for This and Future Generations*, 71 Mont. L. Rev. 299, 302 (2010). Justice Nelson opposes the notion that these rights are aspirational: “These are not simply ambitions to strive for when convenient. They are commands. They are not only mandatory, but prohibitory as well. They limit the power of the government.”

142. See *Wadsworth*, 911 P.2d at 1172 (the right to pursue life’s basic necessities, and thus the right to pursue employment, are fundamental rights); and *Simms v. Mont. Eighteenth Jud. Distr. Ct.*, 68 P.3d 678, 682–683 (Mont. 2003) (district court infringed on plaintiff’s right to seek health by ordering him to attend an extensive medical examination in Oregon because the examination risked “unnecessary, painful or harmful procedures”).

The most difficult part of determining whether Article II, Section 3 recognizes substantive rights is whether the phrase “in all lawful ways” was intended to limit or trump the rights protected in Article II, Section 3. Ordinarily when analyzing a plaintiff’s claims that a fundamental right was infringed by a state law, the Court will follow a three-step analysis. It asks (1) whether the right is fundamental; (2) whether the right has been infringed; and (3) whether the State can show a compelling interest for its exercise of police power.<sup>143</sup> What is troubling about the use of the phrase “in all lawful ways” is that, like the worm in the apple that consumes the whole substance, it appears to place the State’s police power *within* the constitutional grant of the right. Should the phrase “in all lawful ways” allow the State to infringe the fundamental rights *without* a showing of compelling interest?

A reading of Article II, Section 3 that considers “in all lawful ways” to be surplusage is unacceptable, because all words and phrases are to be given effect if possible.<sup>144</sup> The phrase could be interpreted narrowly to protect individuals’ conduct only if that conduct does not violate the law. But the phrase “in all lawful ways” could be given a meaning comparable to the “compelling interest” used in Article II, Section 10.

The text of the 1972 Constitutional Convention sheds little light on how the delegates interpreted “in all lawful ways,” because the phrase was retained from the 1889 Montana Constitution.<sup>145</sup> Several cases, however, have interpreted this phrase. In *State v. Gateway Mortuaries*,<sup>146</sup> the Court, in striking down a statute, applied a standard of review similar to rational basis, framing its question as follows:

The act rests upon an attempt to exercise the police power of the state. Does it bear a real and substantial relation to the public health, safety, morals, or some other phase of the general welfare?<sup>147</sup>

In a subsequent case, the Court, affirming the dismissal of a claim, stressed that Article III, Section 3 of the 1889 Montana Constitution “prohibits the enactment of a law which would impair vested rights.”<sup>148</sup> In *State v. Rathbone*<sup>149</sup> the Court tended toward a reading of the Declaration of Rights as substantive but requiring something less than a compelling state interest:

143. See e.g. *Mont. Envtl. Info. Ctr.*, 988 P.2d at 1244–1245; *Wadsworth*, 911 P.2d at 1171–1173.

144. *Hawley v. Bd. of Oil and Gas Conserv.*, 993 P.2d 677, 679–680 (Mont. 2000).

145. Mont. Const. of 1889, art. III, § 3; see also Mont. Const. Conv. Procs., *supra* n. 136.

146. *State v. Gateway Mortuaries*, 287 P. 156 (Mont. 1930).

147. *Id.* at 157 (striking down a statute prohibiting burial contracts made before death by finding the law to be an “unreasonable and arbitrary invasion upon the constitutional rights of the citizen.” *Id.* at 159.).

148. *Young v. Bd. of Trustees of Broadwater Co. High Sch.*, 4 P.2d 725, 728 (Mont. 1931).

149. *State v. Rathbone*, 100 P.2d 86 (Mont. 1940).

It is conceded that the construction to be given a right guaranteed to the individual by the Constitution must always be a reasonable one. The result of the operation of the police power is necessarily in most instances an infringement of private rights, but in the exercise of such power, property and *individual rights may be injured or impaired only to the extent reasonably necessary to preserve the public welfare.*<sup>150</sup>

The Court cited that language with approval in *Garden Spot Market, Inc. v. Byrne*<sup>151</sup> and characterized Article III, Section 3 of the 1889 Montana Constitution as “constitutional inhibitions upon the police power,” again treating the Declaration of Rights as a substantive provision that limits the police power.<sup>152</sup>

Article II, Section 3 of the Montana Constitution has generally been treated as substantive. The Court’s interpretation of the phrase “in all lawful ways,” however, has never been explicit and has tended to find a case-by-case balance between the need to protect the substantive rights of Article II, Section 3 of the Montana Constitution, and the need to permit some exercise of the police power. The crucial question is *how much* police power is to be permitted. Although the Court reserves wide discretion to itself to find a balance between substantive rights and police power, its tendency has been to apply strict scrutiny to infringements of Article II, Section 3.<sup>153</sup>

*B. The plaintiffs’ fundamental rights to pursue employment and to seek health were infringed, but their fundamental right to privacy was not.*

As a result of the conclusion reached above, the analysis of whether the plaintiffs’ fundamental rights were infringed will not consider the police power of the State outside of the analysis of strict scrutiny review in Section C below. The Court was incorrect to hold, as it did in *Wiser* and *MCIA*, that

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150. *Id.* at 92 (emphasis added) (landowner’s conviction for killing an elk out of season in defense of his property reversed).

151. *Garden Spot Mkt., Inc. v. Byrne*, 378 P.2d 220 (Mont. 1963).

152. *Id.* at 228 (a law requiring a license for the sale of coupons or “redeemable devices,” and mandating an unreasonably high fee to obtain the license, violated Article III, Section 3 of the 1889 Montana Constitution).

153. *Butte Comm. Union*, 712 P.2d at 1312 (right to life’s basic necessities not infringed under analysis of delegates’ intent at Montana Constitutional Convention, rational basis review applied); *Wadsworth*, 911 P.2d at 1174 (right to pursue employment infringed notwithstanding state police power, and strict scrutiny applied); *Kafka v. Hagerer*, 176 F.Supp.2d 1037, 1043 (“No fundamental right is implicated by banning fee killing of game farm animals . . . . To accept Plaintiffs’ argument would be the equivalent of neutering the regulatory power of state government.”); *Wiser*, 129 P.3d at 139 (because state has police power to regulate medical procedures, the right to pursue employment not infringed and rational basis applied).

the State's police power can trump the effectiveness of an individual's fundamental rights without the showing of a compelling state interest.<sup>154</sup>

*1. Does the 2011 MMA infringe on medical marijuana Providers' right to pursue employment by prohibiting them from charging fees or assisting more than three clients?*

In previous decisions on the right to pursue employment, the Court considered the following factors: (1) whether the law completely proscribes an activity or leaves an individual "free to pursue" their employment in general;<sup>155</sup> (2) whether the individual is actually prohibited by the statute from pursuing the basic necessities of life;<sup>156</sup> and (3) whether the plaintiff's claim relies upon a claim of a property interest in a particular job.<sup>157</sup>

In *MCIA* the Court held that the Providers, "who are ultimately horticulturalists, remain free to pursue horticulture work generally."<sup>158</sup> Here, the Court's choice between a wide scope of "employment" (Providers are horticulturalists) and a narrow scope (Providers are providers of medical marijuana as defined in the 2011 MMA<sup>159</sup>) is likely outcome-determinative. Because the Court selected the wide scope, offering no reasons for its choice, it found that Providers "remain free" to pursue horticulture.<sup>160</sup>

The Court should have selected the narrow scope classification to follow its previous decisions. In *Wadsworth* and in *Wiser*, the plaintiffs' specific professions were specifically regulated *as professions* by the State.<sup>161</sup> Here, the role of Provider is specifically defined and regulated within the

154. The dissent in *Abigail Alliance* stresses, as does the analysis in this Note, that courts should be careful to separate the analysis of whether a fundamental right exists from the analysis of the compelling state interest. *Abigail Alliance*, 495 F.3d at 715–716.

155. *Wiser*, 129 P.3d at 139. In *Wiser* the Court held that denturists "remain free to pursue denture work generally, and further, are not completely proscribed from performing partial denture work." The *Wiser* Court observed that in *Wadsworth*, the Court held the regulation prohibiting state appraisers from moonlighting did in fact completely proscribe appraisers from "employment in their free time." *Id.* (citing *Wadsworth*, 911 P.2d at 1176).

156. In a special concurrence to *Wadsworth*, Justice Erdmann argued that the majority opinion "fails to construe the meaning of 'life's basic necessities.'" In fact there was no discussion in the majority opinion as to whether *Wadsworth's* second job was needed in order for him to obtain these basic necessities." *Wadsworth*, 911 P.2d at 1179 (Erdmann, J., specially concurring).

157. The Court has held many times that an individual "does not have a property interest in a particular job." See *Boreen v. Christensen*, 884 P.2d 761, 770 (Mont. 1994); *Wadsworth*, 911 P.2d at 1173. This question is not relevant to *MCIA* because medical marijuana providers are in essence independent contractors providing a personal service and therefore do not claim a property interest in a particular position with a particular employer.

158. *Mont. Cannabis*, 286 P.3d at 1166.

159. Mont. Code Ann. § 50–46–302(10) (2011).

160. *Mont. Cannabis*, 286 P.3d at 1166.

161. *Wadsworth*, 911 P.2d at 1167–1168; *Wiser*, 129 P.3d at 136.

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2011 MMA.<sup>162</sup> A Provider must register with the Department of Public Health and Human Services; however, the 2011 MMA does not require that a Provider have any background or expertise in horticulture.<sup>163</sup> The 2004 MMA, by contrast, does not refer to Providers but to “caregivers,” who are defined as individuals who have “agreed to undertake responsibility for managing the well-being of a person with respect to the medical use of marijuana.”<sup>164</sup> The 2004 MMA includes no prohibition on caregivers charging fees for their services.<sup>165</sup>

Just as *Wadsworth* and *Wiser* involved restrictions on professions that were defined and regulated by the State, *MCIA* involves a profession that was defined and regulated by the State in the 2004 MMA and subsequently prohibited by the 2011 MMA. Furthermore, because of the difficulty of growing usable marijuana, the regulated profession of caregiver or Provider is necessary in order to ensure the registered cardholders’ access to their medication, especially for a person suffering from serious health issues.<sup>166</sup> Although the Court had discretion to choose whether to frame the scope of employment narrowly or broadly, it chose to frame the scope of employment narrowly in *Wiser* and *Wadsworth* and should have done so here as well.

Because the better definition of medical marijuana Providers is the narrow, statutory definition, the 2011 MMA infringed the right of Providers to pursue employment. Therefore the State must show that the law was narrowly tailored to serve a compelling interest.

2. *Does the 2011 MMA infringe registered cardholders’ right to seek health by restricting their access to medical marijuana?*

The Court has never fully analyzed the right to seek health under Article II, Section 3 of the Montana Constitution.<sup>167</sup> Under *Wiser*, individuals have a right to obtain and reject medical treatment. In *Wiser* the Court could have chosen to follow the Texas case *Andrews*, as the plaintiffs argued, by

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162. Mont. Code Ann. § 50–46–302(10) (2011).

163. *Id.*

164. Mont. Code Ann. §50–46–102(1)(a) (2005).

165. *Id.* at §§ 50–46–101 to 210.

166. Appellee’s Response and Cross-App. Br., *Mont. Cannabis Indus. Assn.*, 2012 WL 28772 at 22–24 (Mont. Jan. 17, 2012) (DA 11–0460).

167. In *Wiser* and *Armstrong*, the specific rights at issue involve the right to privacy. The majority opinion in *Armstrong* briefly mentions that the Article II, Section 3 right to seek health is part of the “overlapping and redundant rights” in the Montana Constitution. *Armstrong*, 989 P.2d at 383. Justice Gray’s special concurrence to *Armstrong* sharply criticizes Justice Nelson’s majority opinion for including Article II, Section 3 and a host of other rights, all of which are “far beyond the scope of this case.” *Armstrong*, 989 P.2d at 384 (Gray, J., specially concurring). Because the bulk of *Armstrong*’s analysis is directed at the right to privacy, it is not considered in detail here.

holding that the right to seek health includes the right to “obtain medical care from professionals who have not been determined by the regulating authority to be qualified to provide the desired service.”<sup>168</sup>

In *MCIA* the plaintiffs argued: (1) the right to seek health is broad and should include the right to access a legal drug; (2) the State cannot show a compelling interest for restricting access to that drug;<sup>169</sup> and (3) the effect of the 2011 MMA is to substantially restrict access to medical marijuana even beyond the ostensible purpose behind the 2011 MMA, which was to counteract the Widespread Abuses.<sup>170</sup>

The State’s arguments and the Court’s arguments in its majority opinion belong under the compelling state interest analysis and not under the right to seek health analysis. The Court cites *Abigail Alliance* and its litany of supporting cases to argue that no court in another jurisdiction has held that individuals have a “fundamental right to use any drug, regardless of its legality.”<sup>171</sup> However, the current legal status of a drug or treatment has no place in the analysis of a fundamental right; otherwise, anything currently outlawed by a statute, no matter how unjust the prohibition, would be held outside the fundamental right. The current legal status of a medical treatment, and the legislature’s purpose behind regulating a medical treatment, belong in the analysis of compelling state interest.

The plaintiffs in this case are correct to argue that the 2011 MMA infringes their right to seek health by unconstitutionally restricting their access to the drug of their choice, making it difficult or impossible to obtain marijuana.<sup>172</sup> Further, the State made no argument that the right to seek health was *not* infringed by restricting registered cardholders’ access to marijuana. Therefore, the Court should have found the plaintiffs’ fundamental right to seek health was infringed by the provisions of the 2011 MMA that *restrict* plaintiffs’ access to marijuana. However, this is not to say that there was an infringement of any *affirmative* right of access to marijuana. The plaintiffs in *MCIA* did not argue that they have an affirmative right of access under the Montana Constitution; rather, the plaintiffs made the less ambitious argument that the 2011 MMA was unconstitutionally restricting their access to a legal medicine.<sup>173</sup>

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168. *Wiser*, 129 P.3d at 137 (citing *Andrews*, 498 F.Supp. at 1055–1057).

169. Appellee’s Response and Cross-App. Br., *supra* n. 166, at 28–32.

170. *Id.* The plaintiffs argue that the Widespread Abuses are “exaggerated.” *Id.* at 5.

171. *Mont. Cannabis*, 286 P.3d at 1166 (citing *Abigail Alliance*, 495 F.3d at 695 n. 18).

172. Appellee’s Response and Cross-App. Br., *supra* n. 167, at 28–32.

173. *Id.* at 20–36. If the plaintiffs were to argue for a fundamental right to use marijuana regardless of its legality, it would be an issue of first impression in Montana, and the Court might follow an analysis similar to the analysis of the right to privacy in Section V.B.3., *infra*; alternately, the Court might follow the line of cases from other jurisdictions cited in *Abigail Alliance* in denying plaintiffs’ claim. *Abigail Alliance*, 495 F.3d at 695 n. 18.

3. *Does the 2011 MMA infringe on registered cardholders' right to privacy by placing restrictions on their access to medical marijuana?*

Unlike the right to seek health, the right to privacy under Article II, Section 10 of the Montana Constitution has been litigated, and analyzed in detail, a number of times.<sup>174</sup> There are a number of components to the right to privacy, including the right to be free from warrantless search and seizure<sup>175</sup> and the informational right to privacy.<sup>176</sup> The relevant aspect of the right to privacy here is the personal autonomy component.

The Court has adopted the test from *Palko v. Connecticut*<sup>177</sup> in its analysis of the personal autonomy component of the right to privacy.<sup>178</sup> In *Palko* the United States Supreme Court asked the following question to determine the constitutionality of a statute: “Does it violate those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions?”<sup>179</sup> The notion of what is or is not fundamental is described by analogy in *Griswold v. Connecticut*:<sup>180</sup>

We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions. This law, however, operates directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation.<sup>181</sup>

Courts will first review whether there is a “careful description of the asserted fundamental liberty interest,” and if there is a sufficiently careful description, courts will then ask whether the fundamental right is found to be “deeply rooted in this Nation's history and tradition.”<sup>182</sup>

In *Raich v. Gonzales*,<sup>183</sup> the Ninth Circuit considered whether the Due Process Clause of the United States Constitution “embraces a right to make a life-shaping decision on a physician's advice to use medical marijuana to

174. See generally *Town of Ennis v. Stewart*, 807 P.2d 179 (Mont. 1991); *Gryczan*, 942 P.2d 112; *Armstrong*, 989 P.2d 364; *Wiser*, 129 P.3d 133.

175. E.g. *State v. Ellis*, 210 P.3d 144 (Mont. 2009).

176. E.g. *Gryczan*, 942 P.2d at 122.

177. *Palko v. Conn.*, 302 U.S. 319 (1937), overruled, *Benton v. Md.*, 395 U.S. 784 (1969).

178. *Id.* at 328.

179. *Id.* (citation omitted) (For the application of the *Palko* test by the Montana Supreme Court, see *Gryczan*, 942 P.2d at 122–123.).

180. *Griswold v. Conn.*, 381 U.S. 479 (1965).

181. *Id.* at 482.

182. *Washington v. Glucksberg*, 521 U.S. 702, 720–721 (1997) (internal citations omitted). The United States Supreme Court, Rehnquist, C.J., applied rational basis review to Washington's statute prohibiting assisted suicide and upheld the statute: “That many of the rights and liberties protected by the Due Process Clause sound in personal autonomy *does not warrant* the sweeping conclusion that any and all important, intimate, and personal decisions are so protected.” *Id.* at 727 (internal citations omitted) (emphasis added).

183. *Raich v. Gonzales*, 500 F.3d 850 (9th Cir. 2007).

preserve bodily integrity, avoid intolerable pain, and preserve life, when all other prescribed medications and remedies have failed.”<sup>184</sup> The court concluded that, despite the “rising number” of states to permit medical marijuana, “the use of medical marijuana has not obtained the degree of recognition today that private sexual conduct had obtained by 2004 in *Lawrence*.”<sup>185</sup> The court in *Raich* acknowledged “that day may be upon us sooner than expected.”<sup>186</sup>

In *Gryczan*, the Court held that adults engaging in consensual, non-commercial sex is a type of interest “sufficient to invoke the special protections of a privacy right.”<sup>187</sup> The Court observed that “it is hard to imagine any activity that adults would consider more fundamental, more private, and, thus, more deserving of protection from governmental interference than non-commercial, consensual adult sexual activity.”<sup>188</sup>

In *Armstrong* the Court held that “decisions affecting marriage and childbirth are *so intimate and personal* that people must in principle be allowed to make these decisions for themselves, consulting their own preferences and convictions, rather than having society impose its collective decision upon them.”<sup>189</sup> *Armstrong* further extended the holding of *Gryczan* into the sphere of medical decisions, stating that “[j]ust as the government has no business in the bedrooms of consenting adults, . . . neither does it have any business in the treatment rooms of their health care providers.”<sup>190</sup>

If the *Palko* standard had been applied to the present case, the Court would likely have concluded no fundamental right exists for a medical marijuana patient to “make medical judgments affecting his or her bodily integrity and health in partnership with a chosen health care provider,”<sup>191</sup> because the right to privacy in choosing a specific medication in partnership with a physician, regardless of the legality of the drug, is *not* so deeply-rooted in American history and tradition. American society in general has been increasingly receptive to the relaxation of marijuana laws;<sup>192</sup> however, it remains difficult to argue that a law regulating the right to access medical

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184. *Id.* at 864 (on remand from U.S. Supreme Court’s decision in *Gonzales v. Raich*, 545 U.S. 1, the Ninth Circuit considered Raich’s common-law and constitutional claims that she had a right to use medical marijuana and affirmed the denial of her claims).

185. *Id.* at 864–865 (citing *Lawrence v. Texas*, 539 U.S. 558 (2003)).

186. *Id.* at 865.

187. *Gryczan*, 942 P.2d at 123.

188. *Id.*

189. *Armstrong*, 989 P.2d at 377 (emphasis added).

190. *Id.* at 380 (citation omitted).

191. *Id.* at 370.

192. See e.g. Procon.org, *Votes and Polls, 2000–Present*, [http://medicalmarijuana.procon.org/view\\_additional-resource.php?resourceID=149](http://medicalmarijuana.procon.org/view_additional-resource.php?resourceID=149) (last updated June 10, 2013) (Numerous polls show substantial support in recent years for medical marijuana for patients with certain specific health conditions. Most of the polls indicate not just majority support but supermajority support.).

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marijuana violates a fundamental principle of liberty and justice lying at the base of all our civil and political institutions.<sup>193</sup> Medical marijuana is not as deeply-rooted as the choice of consenting sexual partners, as in *Gryczan*; or choices related to childbearing, as in *Armstrong*. Medical marijuana is not “so intimate and personal” that people must be allowed to act upon their own convictions in consultation with medical professionals without state interference.<sup>194</sup>

There is, however, significant evidence of a softening of views toward marijuana. The Obama Administration has hinted at a program of non-enforcement.<sup>195</sup> Twenty states have legalized medical marijuana, two states have legalized marijuana altogether, and four other states have legislation pending to legalize medical marijuana.<sup>196</sup> Furthermore, an analysis under the *Palko* test probably should not dwell too much on the existence of opposition to a particular hot-button issue. Otherwise no court would have found that state laws restricting abortions, as in *Armstrong*, were unconstitutional.<sup>197</sup>

Less than two months after the Court’s decision in *MCIA* was released in September 2012, Montanans voted on a statewide ballot initiative asking whether the 2011 MMA should be allowed to take effect, or whether it should be scrapped in favor of the previous law.<sup>198</sup> Montana voters chose the more restrictive 2011 MMA by a margin of about fifteen percentage points.<sup>199</sup> This ballot result does not necessarily reflect Montanans’ specific opinions about marijuana as a fundamental right; it might speak more directly to Montanans’ belief that the State had a compelling interest in curtailing the Widespread Abuses.

It is therefore a close call whether the plaintiffs in *MCIA* could show that their personal autonomy interest in the right to privacy was infringed by the 2011 MMA. American society as a whole appears to be more accepting of medical marijuana now than it was in 2007 when *Raich v. Gonzales* was decided.<sup>200</sup> However, although the case has a number of similarities to *Armstrong*, the fact remains that the right to abortion is a more fundamental right in American society than the right to access medical

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193. *Palko*, 302 U.S. at 328.

194. *Armstrong*, 989 P.2d at 377. Not only has marijuana been illegal for most of the last eight decades, and Americans in support of tougher sentencing for drug crimes, but marijuana use has been associated throughout American history with the counterculture and with marginalized individuals.

195. James M. Cole, *supra* n. 38.

196. Procon.org, *20 Legal Medical Marijuana States and D.C.*, *supra* n. 32.

197. *Armstrong*, 989 P.2d 364; *Griswold*, 381 U.S. 479.

198. Montana Secretary of State, 2012 Statewide General Election Canvass, [http://sos.mt.gov/Elections/2012/2012\\_General\\_Canvass.pdf](http://sos.mt.gov/Elections/2012/2012_General_Canvass.pdf), 27 (accessed October 17, 2013).

199. *Id.*

200. *Raich*, 500 F.3d at 865.

marijuana. It is likely the *Palko* standard has not yet been satisfied for medical marijuana. The Court was correct to conclude that the right to privacy standing on its own is not implicated by the 2011 MMA. In the future, courts might hold that restricting access to medical marijuana, perhaps even recreational marijuana, violates fundamental principles of liberty and justice. But it does not appear that society has reached that acceptance just yet.

*C. Does the 2011 MMA survive strict scrutiny review?*

When the Court applies strict scrutiny review, the State “has the burden of showing that the law . . . is narrowly tailored to serve a compelling government interest.”<sup>201</sup> The two elements of strict scrutiny—that the law be narrowly tailored and that it serve a compelling interest—are conjunctive and must both be satisfied in order for the law to pass constitutional muster.

*1. Can the State show a compelling government interest?*

The Court has been reluctant to find compelling state interests in a number of recent cases. In *Gryczan*, the State attempted to argue that its interests in “containing the spread of AIDS” and “protecting public morals” were compelling state interests.<sup>202</sup> The Court disagreed.<sup>203</sup> The Court in *Wadsworth* concluded that the State failed to demonstrate a compelling interest because the State failed to present evidence showing the existence of a compelling interest.<sup>204</sup> The Court was not persuaded by the State’s evidence that the Department of Revenue’s rule limiting outside employment was to avoid the “appearance of impropriety.”<sup>205</sup> In *Armstrong*, the Court found “there is simply no evidence to support the contention that this practice by [plaintiffs] Cahill and Armstrong in any way endangers women’s health.”<sup>206</sup> Courts in other jurisdictions have previously held that there is not a fundamental right to use a drug regardless of its legality and that an individual’s choice of medication is within the government’s interest in protecting health.<sup>207</sup>

201. *Snetsinger*, 104 P.3d at 450 (internal citation omitted).

202. *Gryczan*, 942 P.2d at 123–124.

203. *Id.* at 124–126.

204. *Wadsworth*, 911 P.2d at 1174–1175 (“Necessarily, *demonstrating* a compelling interest entails something more than simply saying it is so.”).

205. *Id.* at 1174. Because no evidence was presented that the conduct of any Department of Revenue employees had ever threatened the appearance of impropriety, the purpose behind the rule had little value; thus, the State could not show a compelling interest.

206. *Armstrong*, 989 P.2d at 381 (quoting the trial court’s finding).

207. See *Abigail Alliance*, 495 F.3d 695; *Privitera*, 591 P.2d 919; *Rutherford v. U.S.*, 442 U.S. 544 (1979); *Co. of Santa Cruz*, 279 F. Supp. 2d 1192. Perhaps courts’ rejection of constitutional “affirmative access” claims arise from the thought that, if affirmative access to medicine is a fundamental right,

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Under the *Armstrong* standard, where the State must put on evidence to show the compelling interest, in *MCIA* the State did present evidence regarding the Widespread Abuses.<sup>208</sup> The State considered the Widespread Abuses sufficient to constitute a compelling state interest because it did not attempt to make other claims about the potential harm involving marijuana: for instance, that marijuana is a “gateway drug” that leads youth to more harmful drugs; that the act of smoking marijuana is harmful; that the science showing health benefits from marijuana is dubious; that marijuana “sends the wrong message to our children”; that medical marijuana leads to more children aged twelve to seventeen using marijuana; and that other treatments are adequate.<sup>209</sup> Rather, the State pointed to large-scale grow operations; healthy young folk smoking marijuana openly after obtaining a medical marijuana card merely by claiming chronic pain; caregivers raking in enormous fees and shamelessly advertising their product.<sup>210</sup> Instead of arguing marijuana is harmful, the State argued the 2004 MMA permitted widespread recreational marijuana use because its provisions were so lax.<sup>211</sup> The plaintiffs make two primary arguments that the Widespread Abuses are not sufficiently serious: first, marijuana has positive effects on the health of many users; and second, there are so few proven health problems associated with marijuana that no reason exists why higher numbers of people using it should constitute a compelling interest.<sup>212</sup>

This note will not attempt to analyze the thorny issue of whether marijuana actually improves a person’s health as medicine does, impairs a person as alcohol does, or addicts a person like methamphetamine.<sup>213</sup> Because the portions of the 2011 MMA at issue in *MCIA* were not narrowly tailored, there is no need to further analyze whether marijuana is harmful enough to

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patients and doctors consulting together might agree that the patient should be prescribed, for instance, methamphetamine regardless of its legality.

208. Br. of Appellant, *supra* n. 41, at 4–5.

209. Barry McCaffrey, “Statement by the Director of the Office of National Drug Control Policy,” reprinted in Musto, *supra* n. 8, at 534–539.

210. Br. of Appellant, *supra* n. 41, at 4–5.

211. *Id.*

212. Appellees’ Response and Cross-App. Br., *supra* n. 67, at 3–7. The weakness of the State’s argument is seen by analogy to the over-the-counter painkiller Motrin: the State is not alarmed if high numbers of Montanans who don’t need it ingest Motrin. Therefore, unless marijuana is more harmful to the public health than Motrin, the State can show no compelling interest.

213. The issue of the health benefits and/or harm related to marijuana has been widely debated; however, a great deal of that writing is one-sided and biased either in favor of or against marijuana. See Isralowitz & Meyers, *supra* n. 7, at 18–19. For a scholarly overview of the subject that presents many relevant primary documents, see Musto, *supra* n. 8.

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justify the State in passing the 2011 MMA. The State cannot show that the 2011 MMA served a compelling government interest.<sup>214</sup>

2. *Is the 2011 MMA narrowly tailored to serve the government interest?*

The State does not have a strong argument that the 2011 MMA is narrowly tailored. The State's purpose behind the limitations on cultivation and on the activity of Providers was to stop the Widespread Abuses. The express purposes of the 2011 MMA are to "allow for the *limited* cultivation . . . of marijuana" and to "allow individuals to assist a *limited* number of registered cardholders."<sup>215</sup> However, this might have been accomplished through the simple act of redefining "chronic pain" narrowly enough to prevent tens of thousands of healthy Montanans from claiming chronic pain.<sup>216</sup> Further, since the 2011 MMA prevents Providers from charging fees for their services,<sup>217</sup> it is difficult to understand why the law also needs to restrict Providers from assisting more than three patients at a time, or vice versa. Therefore, the 2011 MMA cannot reasonably be understood as a statute that has been narrowly tailored to serve the State's compelling interest. The portions of the 2011 MMA that were at issue in *MCIA* should have been held unconstitutional by the Court.

D. *MCIA presented a justiciable controversy.*

Although neither party raised the issue of justiciability in *MCIA*, Justice Nelson analyzed it in his dissent and concluded that the case should have been dismissed.<sup>218</sup> Justice Nelson's dissent is incorrect in its claim that the "question whether plaintiffs' use, possession, or distribution of marijuana is in compliance with Montana law involves a purely academic (and therefore nonjusticiable) determination."<sup>219</sup> Courts analyze whether a controversy is "adverse" based upon how vigorously the parties litigate it: "The presence of unmistakable concreteness and vigorous adversary argument in a dispute can be enough to avoid an advisory opinion problem even when

214. Indeed, at no point did the State even argue that the 2011 MMA might survive strict scrutiny review. The State's arguments all hinged on the need for the Court to find that rational basis review was appropriate. *See e.g.* Br. of Appellant, *supra* n. 41, at 16.

215. Mont. Code Ann. § 50-46-301(2)(b) to (c) (emphasis added).

216. The 2004 MMA did not define chronic pain, while the 2011 MMA does define it and requires "objective proof" of the chronic pain. Mont. Code Ann. § 50-46-302(2)(c) (2011).

217. *Id.* at § 50-46-308(4), (6).

218. *Mont. Cannabis*, 286 P.3d at 1171-1172 (Nelson, J., dissenting).

219. *Id.* at 1170 (citation omitted). A case is only justiciable if it is "definite and concrete, touching legal relations of parties having adverse legal interests." *Id.* at 1169 (citing *Reichert v. State ex rel. McCulloch*, 278 P.3d 455, 471 (Mont. 2012)).

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the nominal parties to the lawsuit agree with each other on legal issues.”<sup>220</sup> The specific doctrine of justiciability at issue in *MCIA* is whether the plaintiffs are seeking an advisory opinion, defined as “an opinion advising what the law would be upon a hypothetical state of facts, or upon an abstract proposition.”<sup>221</sup>

Here, there is a significant presence of concreteness and adversary argument, and neither party seeks an opinion upon hypothetical facts. Several plaintiffs are caregivers under the 2004 MMA and would be barred from pursuing their profession under the 2011 MMA. Other plaintiffs are registered cardholders and would be unable to obtain marijuana under the 2011 MMA due to restrictions on caregivers. The State’s interest is concrete because it has a direct stake in preventing the Widespread Abuses. Further, the issue is not hypothetical because, after passage of the 2011 MMA, state law enforcement will have the authority to enforce the limitations on providers assisting more than three clients and charging fees.

Justice Nelson’s argument that *MCIA* is nonjusticiable relies upon his argument that the federal CSA preempts state law on marijuana.<sup>222</sup> If the federal CSA does not preempt the 2011 MMA, then the present case meets all requirements of a case or controversy. Under the Supremacy Clause of the United States Constitution, federal law “shall be the supreme Law of the Land.”<sup>223</sup> Preemption by federal agencies is increasingly seen as the accepted norm, and express anti-preemption provisions in federal laws are the exceptional rarity.<sup>224</sup> When the federal courts determine whether a state law has been preempted by a federal law, the primary inquiry is into the intent behind the federal law.<sup>225</sup>

The preemption doctrine has been refined into a number of different categories.<sup>226</sup> The type of preemption relevant to *MCIA* is “physical impossibility” conflict preemption.<sup>227</sup> Under this concept, a state law may be struck down if it is in “actual conflict” with precise and sufficiently narrow

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220. Laurence Tribe, *American Constitutional Law*, Third Edition, Vol. 1, 329 (2000) (citing *INS v. Chadha*, 462 U.S. 919 (1983)).

221. *Mont. Cannabis*, 286 P.3d at 1169 (Nelson, J., dissenting) (citing *Reichert*, 278 P.3d at 471).

222. *Id.* at 1170–71.

223. U.S. Const. art. VI, cl. 2.

224. James T. O’Reilly, *Federal Preemption of State and Local Law: Legislation, Regulation and Litigation* 36 (American Bar Association 2006) (citing Mary J. Davis, *Unmasking the Presumption in Favor of Preemption*, 53 S.C. L. Rev. 967 (2002)).

225. *Wyeth v. Levine*, 555 U.S. 555, 565 (2009); *AGG Enter. v. Washington Co.*, 281 F.3d 1324, 1329 (9th Cir. 2002) (The Court will consider “what Congress intended in its statute and at most with what Congress thought” the statute would accomplish. *AGG Enter.*, 281 F.3d at 1329).

226. O’Reilly, *supra* n. 224, at 72.

227. *Mont. Cannabis*, 286 P.3d at 1170 (Nelson, J., dissenting). For a description of physical impossibility conflict preemption, see *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–143 (1963).

objectives that underlie the federal enactments or if regulatory objectives of the two governments are incompatible.<sup>228</sup>

In the present case, the federal courts are not likely to conclude that the CSA preempts state laws such as the 2011 MMA. First, the CSA has long been held in a number of contexts not to have preempted state law.<sup>229</sup> Second, the CSA includes the following clause to limit the CSA's preemption of state law only to cases of physical impossibility:

No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, *unless there is a positive conflict* between that provision of this subchapter and that State law so that the two cannot consistently stand together.<sup>230</sup>

Under one exceedingly literal interpretation, there is no positive conflict in complying with the 2011 MMA and the CSA, because the 2011 MMA does not affirmatively require Montanans to obtain a medical marijuana card and use a controlled substance.<sup>231</sup> Justice Nelson's dissent in *MCIA* argued that the physical impossibility exception does apply because it is clear the plaintiffs intend to continue using marijuana in violation of the CSA.<sup>232</sup> There is a physical impossibility, Justice Nelson argues, in obeying the CSA, which criminalizes marijuana use or possession and states marijuana has no known medical use; while simultaneously complying with the 2011 MMA, which asserts marijuana may be used for medical purposes.<sup>233</sup>

Even more than the abstract issue of physical impossibility, there remains the very real fact the State has more law enforcement resources in Montana than the federal government does. The State prosecutes more drug violations in Montana than does federal law enforcement. Neither the 2004 MMA nor the 2011 MMA provides medical marijuana providers or registered cardholders with an affirmative defense in the event of a federal pros-

228. O'Reilly, *supra* n. 224, at 72 (citing *Burbank v. Lockheed Air Terminals*, 411 U.S. 624 (1973)).

229. *Gonzales v. Or.*, 546 U.S. 243 (2006) (Under the CSA, federal law enforcement may not prohibit doctors from prescribing regulated drugs for use in physician-assisted suicide, as authorized by state law.); *Cal. v. Gard*, 143 Cal. Rptr. 346, 347-348 (Cal. App. 1st Dist. 1978) (CSA has not preempted state laws regarding sales of controlled substances by a physician to another physician.); *Nichols v. Bd. of Pharm.*, 657 P.2d 216, 219 (Or. App. 1983) (Oregon law prohibiting pharmacists from dispensing controlled substances based on prescription written by a doctor not registered in Oregon was not in "positive conflict" with the CSA). For a leading case that upholds the constitutionality of the CSA, see *Gonzales v. Raich*, 545 U.S. 1 (federal government's authority upheld under the Commerce Clause to regulate medical marijuana).

230. 21 U.S.C. § 903 (emphasis added).

231. See *Wyeth*, 555 U.S. at 590 for an example of this type of reasoning.

232. *Mont. Cannabis*, 286 P.3d at 1170 (Nelson, J., dissenting). Justice Nelson himself raised the issue of preemption, because neither the plaintiffs nor the State wished to argue that the CSA might preempt the 2011 MMA. *Id.* at 1171.

233. *Id.* at 1170.

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ecution under the CSA. However, federal prosecution remains unlikely to occur on a wide scale due to limited federal resources. As a result, the state law is relevant to registered cardholders and providers, and a challenge to the 2011 MMA *does* have the character of concreteness and adversary argument.

It is not easy to predict how a state court would rule if, for instance, state law enforcement were to attempt to apply the CSA to prosecute a Montana citizen who possessed marijuana in full compliance with the 2011 MMA. Furthermore, today's United States Supreme Court, tending to favor state rights over sweeping federal programs, has been slow to find federal preemption of state laws.<sup>234</sup> Given the current composition of the United States Supreme Court and its recent tendency to uphold state laws,<sup>235</sup> it appears more likely than not that a federal court could "reconcile the operation of both statutory schemes"<sup>236</sup> and uphold the 2011 MMA. Thus, Justice Nelson was mistaken in his claim that the Court should have dismissed the case because the CSA preempted the 2011 MMA.<sup>237</sup>

## V. CONCLUSION

The 2011 MMA was "foolish legislation"<sup>238</sup> for using draconian measures to solve the Widespread Abuses. The Court's decision in *MCIA* is troubling in that it could allow for substantial exercise of the State's police power to regulate for the public health and safety without the statute being subject to strict scrutiny analysis. The Court was wrong to respond to the Widespread Abuses by holding that the state's police power can trump the fundamental rights protected by the Montana Constitution. In the immediate

234. In several recent cases, the United States Supreme Court has held that state laws were not preempted. *E.g. Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005) (Federal law regulating insecticides did not preempt state law. The Court indicated that "we have long presumed that Congress does not cavalierly preempt state-law causes of action. In areas of traditional state regulation, we assume that a federal statute has not supplanted state law unless Congress has made such an intention clear and manifest." (citations omitted)); *Altria Group, Inc. v. Good*, 555 U.S. 70, 77 (2008) (federal cigarette-labeling law did not preempt state law on unfair trade practices).

235. *See Bates*, 544 U.S. 431; *Altria Group, Inc.*, 555 U.S. 70; and *Wyeth*, 555 U.S. 555 for recent examples of the U.S. Supreme Court finding a state law not preempted. However, for recent examples of the U.S. Supreme Court holding that a federal law *had* preempted a state law, *see Am. Ins. Assn. v. Garamendi*, 539 U.S. 396 (2003) (state law requiring insurance disclosure if insurer sold Holocaust-era policies in Europe preempted because the President has broad powers to conduct foreign affairs without state interference); *Ariz. v. U.S.*, \_\_\_ U.S. \_\_\_, 132 S. Ct. at 2510 (portions of state law regulating unauthorized aliens preempted by federal immigration law because the state law "pursued policies that undermine federal law"); and *Hillman v. Maretta*, \_\_\_ U.S. \_\_\_, 133 S. Ct. 1943, 1955 (2013) (federal life insurance act preempts Virginia law because the state law "interferes with Congress' objective that insurance proceeds belong to the named beneficiary").

236. *Merrill Lynch*, 414 U.S. 117, 127 (citation omitted).

237. *Mont. Cannabis*, 286 P.3d at 1170 (Nelson, J., dissenting).

238. Ralph Waldo Emerson, *supra* n. 1, at 248.

future, after the Court's decision in *MCIA* and then a referendum upholding the 2011 MMA and then a district court enjoining portions of the 2011 MMA on remand, it is unclear what the law regarding medical marijuana actually *is* in Montana.

The moment has not yet arrived when access to medical marijuana is protected as a basic principle of justice and fairness. However, with more states legalizing medical marijuana; with Americans gradually coming to accept the legitimacy of medical marijuana; and given the possibility that marijuana advocates will succeed one day in re-scheduling marijuana under the CSA, the moment of marijuana's acceptance will likely occur at some point in the near future.